



OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of
CONSTRUCTION COMPANY OF NORTH AMERICA

Appearances:

For Appellant: Edward J. Fitzpatrick, Attorney at Law, of
Humphrey, Searles; Doyle & McMullen
For Respondent; Chas. J. McColgan, Franchise Tax Commissione

O P I N I O N

This is an appeal pursuant to Section 25 of the Bank and Corporation Franchise Tax Act (Chapter 13, Stats. 1929, as amended) from the action of the Franchise Tax Commissioner in overruling the protest of Construction Company of North America to a proposed assessment of an additional tax in the amount of \$1,459.71 for the year 1931, based upon its net income for the year ended December 31, 1930.

The issues involved in this appeal are whether the Commissioner acted properly in computing a tax for the year 1931 upon the basis of Appellant's 1930 income, and if so, whether a sum of \$50,000 received by Appellant during 1930 from the City and County of San Francisco in full payment for work completed in 1925 was properly considered by the Commissioner as income for the year 1930.

In the year 1920, Appellant entered into a contract, referred to by Appellant as Contract 774, with the City and County of San Francisco, whereby Appellant agreed to construct certain aqueduct tunnels in the mountain division of the Hetch Hetchy project on a cost-plus-a-fixed fee basis, with the maximum cost guaranteed. Work under this contract was completed by Appellant early in the year 1925. Appellant claimed, there was a balance of the fixed fee amounting to \$170,633 due and payable to Appellant in 1925 from the City and County of San Francisco. This payment was withheld by the City and County of San Francisco on the ground that the cost of the work exceeded the contractor's guaranteed maximum cost.

In 1927, Appellant commenced suit in the District Court of the United States against the City and County of San Francisco for the above sum of \$170,633. Pending trial of the action, negotiations were resumed by the Appellant with the City and County of San Francisco which resulted in a compromise settlement pursuant to which the City and County paid the Appellant during the year 1930, the sum of \$50,000 in full payment of all amounts due Appellant for work done pursuant to Contract 77-C.

Shortly after completing its work under Contract 77-C,

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Appellant disposed of all of its assets, such as machinery, equipment, et cetera, and has been doing only such other acts as are necessary to its liquidation. Apparently Appellant's existence was maintained up to 1930, mainly for the purpose of prosecuting or settling its claim against the City and County of San Francisco. Since 1930, its existence has been maintained largely for the purpose of settling its outstanding tax liabilities. Since 1925 Appellant has received no income other than the proceeds from the sale of its assets and other than the above sum of \$50,000 received from the City and County of San Francisco.

There seems to be no question but that Appellant did not engage in any business activities during the year 1931, the year for which the additional assessment herein in question was proposed. Although the Act purports to levy a tax on corporations doing business in this State, it is to be noted that the Legislature by an amendment effective February 27, 1931, provided that the term "doing business" shall include the "enjoyment of the right to do business" and by an amendment effective August 14, 1931, provided that the term shall include the "right to do business." Unquestionably, Appellant possessed the right to do business in this State during the year 1931, and, consequently, under the above amendments to the definition of "doing business" must be considered as "doing business" in the statutory sense, during the year 1931, and must pay a tax under the Act for the year 1931. However, we are of the opinion that this tax should not be measured by Appellant's net income, if any, for the preceding year, as proposed by the Commissioner.

The Bank and Corporation Franchise Tax Act as it was adopted in 1929 and as it read until amended in 1931, imposed a tax only on corporations actually doing business in this State and not upon corporations which had the right to do business but did not actually do business. If the activities in which Appellant has been engaged since 1925, such as selling its assets, and prosecuting its claim against the City and County of San Francisco do not constitute doing business, it would seem that Appellant became subject to the Act, and commenced "doing business" in the statutory sense, for the first time on February 27, 1931, the date on which the first amendment to the definition of doing business above referred to became effective. Consequently, it would seem that its tax for the year 1931, the first year in which it was "doing business" within the meaning of the Act, should be computed, not upon the basis of the preceding year's income, but upon the basis of its income for the year 1931, in accordance with the second paragraph of Section 13 which provides insofar as it is relevant:

"* * * a corporation which commences to do business **in** this state, after the effective date of this act, shall thereupon prepay the minimum tax thereunder, and upon the filing of its return within two months and fifteen days after the close of its taxable year its tax for that year shall be adjusted upon the basis of the net income received during that taxable year."

Inasmuch as Appellant received no net income during the year

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1931, the provisions in Section 4 of the Act for a minimum tax apply, and Appellant's tax for 1931 would be but \$25.

On the other hand, if the activities of Appellant in disposing of its assets and prosecuting its claim against the City and County of San Francisco should be considered as constituting "doing business" within the definition of that term as it read prior to its amendment in 1931, it would seem that Appellant's tax liability for the year 1931 should be determined in accordance with the fourth paragraph of Section 13 which provides:

"If any bank or corporation discontinues actual operations within the state in any year and thereafter has no net income but does not dissolve or withdraw from the state, it shall in the succeeding year and thereafter until dissolution, withdrawal or resumption of operations, pay an annual tax to the state of twenty-five dollars."

Appellant clearly did not engage in business activities during the year 1931. Its activities in disposing of its assets and prosecuting its claim against the City and County of San Francisco came to an end during the year 1930. If those activities constituted doing business, Appellant must be regarded as having discontinued "actual operations within the state" during the year 1930. Thereafter, it received no net income, and it did not dissolve or withdraw from the state during the year 1930 or 1931. Thus, it would seem that all the conditions of the fourth paragraph of Section 13 above quoted, are met:

Consequently, it would seem that Appellant's tax for the year 1931, the year succeeding the year in which it discontinued actual operations, should be a maximum of \$25., the same amount it would be if Appellant were regarded as being subject to the Act for the first time in 1931.

Thus, it would seem that in no event should Appellant's tax for the year 1931 be measured by its net income, if any, for the year 1930, as proposed by the Commissioner, but should in any event be the sum of \$25. This conclusion renders it unnecessary for us to determine whether the activities of Appellant in disposing of its assets and in prosecuting its claim against the City and County of San Francisco amounted to doing business, and further, renders it unnecessary for us to determine whether the sum of \$50,000 received by Appellant during the year 1930 in satisfaction of said claim, was properly considered by the Commissioner as income for the year 1930.

O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the action

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of Chas. J. McColgan, Franchise Tax Commissioner, in overruling the protest of Construction Company of North America, a corporation, against a proposed additional assessment based upon the return of said corporation for the year ended December 31, 1930, under Chapter 13, Statutes of 1929, be and the same is hereby reversed. Said ruling is hereby set aside and said Commissioner is hereby directed to proceed in conformity with this order.

Done at Sacramento, California, this 10th day of October, 1932, by the State Board of Equalization.

R. E. Collins, Chairman
Fred E. Stewart, Member
Jno. C. Corbett, Member
H. G. Cattell, Member

ATTEST: Dixwell L. Pierce, Secretary